

46 Am. Jur. 2d Judges § 208

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Judges

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IX. Disqualification to Act in Particular Case

D. Waiver and Estoppel

§ 208. Particular acts not resulting in waiver of disqualification of judge

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  53

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[Time for asserting disqualification of judge, and waiver of disqualification](#), 73 A.L.R.2d 1238

While certain actions or inactions of a party may give rise to a presumption of waiver of a judge's disqualification,¹ such waiver may not be absolute.²

A waiver does not result where a party is deprived of the opportunity to have the case tried before an impartial judge because a properly assigned judge is unavailable.³

Participating in a prior case does not waive a party's right to substitution in a new action,⁴ and a party's acquiescence to a judge hearing one action does not impair that party's right to challenge that judge from hearing another matter, even if both matters raise closely related issues.⁵

Participation in a contested hearing before a judge not yet assigned to the case does not waive a party's right to disqualification after the judge is assigned to the case, where the rule precluding disqualification after participation in a contested hearing before a judge means the judge who was assigned at the time of the hearing.⁶

No waiver was found where, although the court exercised discretion in setting security, the parties stipulated to a stay of the proceedings pending resolution of a writ of prohibition;⁷ where the judge presided at a preliminary hearing of a criminal prosecution, wherein the determination did not require the resolution of contested fact issues relating to the merits of the case;⁸ where the court rejected a negotiated plea agreement;⁹ where the court passed upon various preliminary motions;¹⁰ or where a party applied for an injunction in order to prevent irreparable damage.¹¹

A party does not, by proceeding to trial, waive a statutory right to peremptorily challenge a judge despite the absence of prejudice, so long as the motion is otherwise timely.¹²

Even allowing the proceedings to continue upon learning the facts upon which the motion for disqualification is based may not always result in a waiver.¹³

Where a judge who self-disqualified subsequently resumes jurisdiction, a party who fails to object at the outset is not thereby precluded from objecting that the judge is disqualified.¹⁴

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Footnotes

- 1 §§ 202 to 207.
- 2 *Tyrrell v. Tyrrell*, 107 Mich. App. 435, 309 N.W.2d 632 (1981).
- 3 *Com. v. Simmons*, 335 Pa. Super. 57, 483 A.2d 953 (1984).
- 4 *Godoy v. Hantman*, 205 Ariz. 104, 67 P.3d 700 (2003).
As to independent or new proceedings, see § 173.
- 5 *Ziesmer v. Superior Court*, 107 Cal. App. 4th 360, 132 Cal. Rptr. 2d 130 (2d Dist. 2003), as modified on denial of reh'g, (Apr. 22, 2003).
- 6 *Medders v. Conlogue*, 208 Ariz. 75, 90 P.3d 1241 (Ct. App. Div. 2 2004), as corrected, (June 3, 2004).
- 7 *State, Dept. of Motor Vehicles and Public Safety v. Eighth Judicial Dist. Court In and For County of Clark*, 113 Nev. 1338, 948 P.2d 261 (1997).
- 8 *Barrett v. Superior Court*, 77 Cal. App. 4th 1, 91 Cal. Rptr. 2d 116 (3d Dist. 1999).
- 9 *Hicks v. State*, 231 Ga. App. 552, 499 S.E.2d 341 (1998) (overruled on other grounds by, *Lewis v. McDougal*, 276 Ga. 861, 583 S.E.2d 859 (2003)).
- 10 *Marsin v. Udall*, 78 Ariz. 309, 279 P.2d 721 (1955).
- 11 *First Nat. Bank v. McGuire*, 12 S.D. 226, 80 N.W. 1074 (1899).
- 12 *Harbor Enterprises, Inc. v. Gunnar Gudjonsson*, 116 Wash. 2d 283, 803 P.2d 798 (1991).
- 13 *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979); *Johnson v. District Court In and For Jefferson County*, 674 P.2d 952 (Colo. 1984).
- 14 *Thacker v. State*, 563 N.E.2d 1307 (Ind. Ct. App. 1990).

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